

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

----- x
IN RE ALUMINUM WAREHOUSING : MDL No. 2481
ANTITRUST LITIGATION : Master Docket No.
This Document Relates To: : 13-md-2481-KBF-RLE
ALL ACTIONS :
----- x

**DEFENDANT THE LONDON METAL EXCHANGE'S SUPPLEMENTAL SUBMISSION
IN SUPPORT OF ITS MOTION TO DISMISS ALL COMPLAINTS ON SOVEREIGN
IMMUNITY GROUNDS IN RESPONSE TO JUNE 3, 2014 ORDER**

The Court's June 3, 2014 order (Doc. No. 416) permits The London Metal Exchange to make a supplemental submission regarding specific issues discussed at the June 3 hearing on the LME's motion to dismiss on the grounds of sovereign immunity. Pursuant to that order, the LME makes the following supplemental submission:

1. Statement from the UK Financial Conduct Authority. The Court stated at the June 3 hearing that it would be "highly interesting" to learn whether or not the UK government would take a position as to whether the LME is acting in its "public capacity" when it regulates approved warehouses. So, the LME approached representatives of the FCA to ask them to provide their views on (a) whether the FCA considers the LME's regulation of approved warehouses, and the load-out rules in particular, a part of the LME's regulatory obligations under the FSMA Recognition Requirements; and (b) whether the FCA actively supervises the LME and, in particular, whether the FCA actively supervises the LME in connection with the LME's regulation of approved warehouses. The FCA provided the letter attached as Exhibit 1 to the

LME confirming that it agrees with all of these points. In the normal course, the FCA's communications with RIEs remain between the FCA and the RIE. In this case, as the FCA letter reflects, the FCA gave its consent to the LME to share this communication with external parties.

2. Supplemental Declaration from Mark Bradley. Mr. Bradley's supplemental declaration addresses the following factual questions that the Court raised at the hearing:

- The LME's Warehouse Agreement (and the terms and conditions which are incorporated by reference) with approved warehouses is a standard form agreement. The LME does not individually negotiate any aspect of it with any warehouse company. It is not a bilateral individually negotiated contract. *Supp. Bradley Decl.* ¶¶ 3-7.
- The LME's regulation of approved warehouses, including through the terms and conditions of the Warehouse Agreement, is necessary for the LME to meet its obligations under the FSMA Recognition Requirements. *Id.* ¶¶ 8-12.
- The Recognition Requirements that govern the LME's conduct today have been in force since 2001. They are broader and more explicit about the LME's regulatory obligations than the ones that were in effect at the time of the *Albatros* decision in 2000. *Id.* ¶¶ 13-15.
- The LME must and does consult the market before it changes the terms and conditions of its Warehouse Agreement. *Id.* ¶¶ 17-19.
- The LME's load-out rules are not a part of a commercial contract; they flow directly from the requirements of Sections 3 and 4 of the Schedule to the Recognition Requirements. *Id.* ¶¶ 20-23.

- The load-out rules, like other changes to the LME's Warehouse Agreement, are set through public notice and consultation procedures, discussed with the FCA and subject to judicial review in UK court. *Id.* ¶¶ 24-28.
- Any purported agreement about when, how or whether to regulate warehouses, including whether warehouses can treat minimum load-out rules as maximums, would be part of the LME's regulatory function. *Id.* ¶¶ 29-31.
- Anyone who is not satisfied with how the LME is regulating approved warehouses can take advantage of the LME's Complaints Procedures, including through a process run by an independent Complaints Commissioner. *Id.* ¶ 32-33.
- The FCA actively supervises the LME's regulation of approved warehouses and its adoption of the load-out rules. *Id.* ¶¶ 34-48.

Respectfully submitted,

Dated: New York, New York
June 10, 2014

/s/ Margaret M. Zwisler
Margaret M. Zwisler (admitted *pro hac vice*)
(margaret.zwisler@lw.com)
William R. Sherman
(william.sherman@lw.com)
Jennifer L. Giordano
(jennifer.giordano@lw.com)
Jeffrey H. Newhouse
(jeffrey.newhouse@lw.com)
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Attorneys for Defendant The London Metal Exchange